No. 208
Court of Limitations
Filed Sept. 5, 1900

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 208.

THE SHOSHONE MINING COMPANY,
Appellant,

vs.

ROYAL J. RUTTER and F. W. BRADLEY,
Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEES.

CURTIS H. LINDLEY,
Solicitor and Counsel for Appellees.

17,294.

Supreme Court of the United States.

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STATEMENT OF THE CASE.

For the purposes of this appeal two cases are consolidated by stipulation of counsel, as they practically involve the same subject-matter.

In the first case, numbered 81 in the trial court, Rutter and Bradley, appellees here, were plaintiffs, and the Shoshone Mining Company, appellant, was defendant. It arose under the following circumstances:—

The Shoshone Mining Company filed an application in the local land office at Cœur d'Alene City, Idaho, for a patent to the Shoshone Mining claim under the provisions of sections 2325 and 2326 of the Revised Statutes of the United States, and the Act of March 3, 1881, supplementary thereto. There was a surface conflict between this claim as surveyed and applied for and the Kirby Fraction claim (sometimes called the Kirby) owned by Rutter and Bradley. During the period of publication of notice of the patent application, Rutter and Bradley filed their adverse claim in the land office, and in due time commenced this action in support thereof. The Shoshone Mining Company is a corporation organized under the laws of the State of Idaho, and Rutter and Bradley were domiciled in that State. In other words all the parties to the controversy originating in the land office were citizens of the same State.

The action was instituted by the adverse claimants upon the equity side of the United States Circuit Court, Ninth Circuit, District of Idaho, upon the assumption that it was one arising under the laws of the United States, and was essentially equitable in its nature. The case was tried upon this theory. A decree was awarded in favor of Rutter and Bradley, which decree was affirmed by the Circuit Court of Appeals, from whose judgment of affirmance this appeal is prosecuted.

The second case, numbered 102 in the trial court, arose as follows:—

During the pendency of the first action, Rutter and Bradley filed application for patent for the Kirby Fraction claim. The Shoshone Mining Company filed an adverse claim in the land office, asserting ownership of the "Ibex" claim which it was alleged conflicted with the Kirby. In due time the Shoshone Mining Company commenced an action in the State court against Rutter and Bradley, patent applicants, to determine the adverse claim so asserted. Rutter and Bradley caused the action to be removed to the United States Circuit Court,

Ninth Circuit, District of Idaho, wherein the first action was pending. No motion to remand the cause to the State court whence it came, was made. After trial upon the merits a decree was rendered in favor of Rutter and Bradley, which decree was affirmed by the Circuit Court of Appeals, from whose judgment of affirmance this appeal is prosecuted.

While it may be generally stated that the two cases involve similar questions, there are some legal problems suggested in one which do not arise in the other. It is expedient, therefore, to discuss them separately. Following the order in which counsel for appellant presents them to the Court, we will first consider case No. 81, the suit originally brought by Rutter and Bradley on the equity side of the United States Circuit Court in support of their opposition to the application of the Shoshone Mining Company for patent to the Shoshone Mining claim.

ERRORS ASSIGNED.

On the appeal from the decree of the trial Court to the Circuit Court of Appeals, twenty-five errors were assigned (Trans., pp. 50–60), many of them directed to the *opinion* of the trial Court. On this appeal from the decree of the Circuit Court of Appeals, the assignment of errors contains only nine specifications (Trans., pp. 259–263), some of which are likewise addressed to the opinion of the trial Court. As we shall hereafter have occasion to note, errors assigned upon the opinion of the Court are irrelevant and immaterial. As we understand the practice, we are not called upon to consider any errors except those properly assigned with respect to the action of the Circuit Court of Appeals from which *this* appeal is prosecuted, unless manifest prejudicial errors unassigned appear on the face of the record.

In their opening brief counsel for appellant restate, refer to and discuss all the errors assigned on their appeal to the Circuit Court of Appeals, thus inviting a discussion of many matters which, according to our understanding, are not proper subjects for present consideration. While objecting to the

legal value of such assignments, we may feel called upon to express our views thereon—because of the invitation—not by reason of the necessity therefor.

We shall endeavor to follow counsel's presentation of the case, and submit our views upon the problems stated in the order in which they are discussed in their opening brief.

As we read the record and counsel's argument, our consideration is invited to the following questions:—

I. **Federal Jurisdiction.**—Is the Circuit Court of the United States a Court of "competent jurisdiction" within the meaning of Section 2326 of the Revised Statutes of the United States and the Act of March 3, 1881, supplementary thereto, where all the parties to the controversy, *i. e.*, the patent applicant and the adverse claimants are citizens of the same State?

Does the action contemplated and required by that section arise under the laws of the United States?

II. **Equity Jurisdiction.**—Is such an action when prosecuted in the Federal Courts an action at law or in equity?

III. **Validity of the Kirby Location.**

a. Was the ground covered by it subject to location?

b. Was there a sufficient discovery?

c. If we assume that a discovery was not made until after the other acts of location were performed, but was made long prior to the inception of any subsequent location, would such discovery be valid as against the subsequent locator?

IV. **The Right of Rutter and Bradley to Maintain the Action.**

a. Were they the real parties in interest?

b. Was the evidence by which appellant sought to show that they were not, admissible?

V. **Perpetuation of the Estate in the Kirby by the Performance of Annual Labor.**

VI. **Appellant's Title to the Shoshone Mining Claim.**

a. May a valid mining location be predicated upon the discovery of a vein on its dip, the apex of which has already been appropriated by a prior locator?

b. Was such asserted discovery within the limits of a prior subsisting location?

Certain other collateral matters of minor importance are referred to in the brief of appellant, but the above is, in our judgment, a comprehensive summary of the questions presented by appellant for the consideration of this Court.

I.

FEDERAL JURISDICTION.

Is the Circuit Court of the United States a "Court of competent jurisdiction" within the meaning of Section 2326 of the Revised Statutes and the Act of March 3, 1881, supplementary thereto, where all the parties to the controversy, i. e. the patent applicant and the adverse claimants, are citizens of the same State?

Does the action contemplated and required by that Section and Statute arise under the laws of the United States?

These questions are so thoroughly analyzed and discussed in the opinions of both trial and appellate courts that we cannot hope to add much that will aid this Court in reaching its conclusions. Some suggestions occur to us, however, which in our judgment are worthy of consideration, or at least are of value sufficient to justify a full statement of our position upon this, probably the most important, branch of the case.

So much of the Statute law of the United States as is here involved may be quoted for purposes of convenience.

The original jurisdiction of the Circuit Court is thus defined:

"The Circuit Courts of the United States shall have original "cognizance, concurrent with the courts of the several States, "of all suits of a civil nature at common law or in equity "where the matter in dispute exceeds, exclusive of interest "and costs, the sum or value of two thousand dollars, and "arising under the constitution and laws of the United "States . . ."

Act of March 3, 1875 (18 U. S. Stats. 470. Rev. Stats. sec. 629).
As amended March 3, 1887 (24 U. S. Stats. 552),
As corrected Aug. 13, 1888 (25 U. S. Stats. 433).

The jurisdiction thus to be exercised is entirely independent of the question of citizenship. The jurisdictional value being present, and all the parties being citizens of the same State the pivotal question is, "Does this suit arise under the laws of the United States?" We concede that before the question can be answered in the affirmative, it must appear upon the face of the pleading presented by the party invoking jurisdiction that the suit arises under the federal laws. The bill of complaint in this case was twice amended, issue of fact having been joined and trial had on the second amended complaint appearing on pages 24–29 of the transcript of the record. The essential averments of this pleading may be epitomized.

1. That all parties are citizens of Idaho.
2. Ownership by plaintiff (subject to the paramount title of the United States) of the Kirby Fraction Lode Mining Claim.
3. Possession in plaintiffs of such claim.
4. The acts performed in perfecting the location of the claim and perpetuating their rights.
5. Survey by the defendant of the Shoshone mining claim overlapping the Kirby.
6. Filing by defendant in the local land office of such survey and application for patent for the Shoshone claim.
7. Filing in such land office by plaintiffs during the period of publication of an adverse claim based upon their ownership of the Kirby.

8. The staying of proceedings on defendant's patent application, awaiting the determination by a court of competent jurisdiction of the right of possession, and the bringing of this suit to secure such determination, within thirty days from the date of filing the adverse claim in the land office.
9. That by said patent proceeding and its prosecution by defendant, plaintiff's title to the Kirby is clouded and impaired.
10. The jurisdictional value.
11. Prayer for relief.

It is quite apparent upon the face of this pleading that this action was instituted pursuant to the requirement of the laws of the United States, prescribing the method of acquiring title by patent to mineral lands of the public domain. The provisions of these laws, so far as they are pertinent to the present inquiry, are contained in Section 2326 of the Revised Statutes and the Act of March 3, 1881. We quote for the purpose of convenient reference.

"SEC. 2326. Where an adverse claim is filed during the "period of publication, it shall be upon oath of the person "or persons making the same, and shall show the nature, "boundaries, and extent of such adverse claim, and all pro- "ceedings, except the publication of notice and making and "filing of the affidavit thereof, shall be stayed until the con- "troversy shall have been settled or decided by a court of "competent jurisdiction, or the adverse claim waived. It "shall be the duty of the adverse claimant, within thirty days "after filing his claim, to commence proceedings in a court of "competent jurisdiction, to determine the question of the "right of possession, and prosecute the same with reasonable "diligence to final judgment; and a failure so to do shall be a "waiver of his adverse claim. After such judgment shall "have been rendered, the party entitled to the possession of "the claim, or any portion thereof, may, without giving further "notice, file a certified copy of the judgment roll with the "Register of the Land Office, together with the certificate of "the Surveyor-General that the requisite amount of labor has "been expended or improvements made thereon, and the "description required in other cases, and shall pay to the "receiver five dollars per acre for his claim, together with "the proper fees, whereupon the whole proceedings and the "judgment roll shall be certified by the Register to the Com-

" missioner of the General Land Office, and a patent shall " issue thereon for the claim, or such portion thereof as the " applicant shall appear, from the decision of the Court, to " rightly possess. If it appears from the decision of the " Court that several parties are entitled to separate and differ- " ent portions of the claim, each party may pay for his portion " of the claim with the proper fees, and file the certificate and " description by the Surveyor-General, whereupon the Register " shall certify the proceedings and judgment roll to the Com- " missioner of the General Land Office, as in the preceding " case, and patents shall issue to the several parties according " to their respective rights. Nothing herein contained shall " be construed to prevent the alienation of a title conveyed by " a patent for a mining claim to any person whatever."

This was supplemented by the Act of March 3, 1881 (21 U. S. Stat. 505), which provides:—

" That if, in any action brought pursuant to Section 2326 of " the Revised Statutes, title to the ground in controversy " shall not be established by either party, the jury shall so " find, and judgment shall be entered according to the verdict. " In such case costs shall not be allowed to either party, and " the claimant shall not proceed in the Land Office or be " entitled to a patent for the ground in controversy until he " shall have perfected his title."

It would seem that the inquiry *Does the action arise under the laws of the United States?* is answered in the affirmative by the statute itself.

Counsel for the appellant urges the view that a case does not arise under the laws of the United States unless there is necessarily involved a disputed question of federal statutory interpretation upon the correct solution of which some asserted right depends; that in suits brought under Section 2326 of the Revised Statutes of the United States no such question necessarily or inferentially arises, but that the rights of the parties are to be determined from a consideration of disputed questions of fact. Therefore, as all the parties to this action are residents of the same State, the federal courts have no jurisdiction.

We respectfully submit that this view is radically erroneous. Counsel's conclusion is deduced from a false premise.

Cases arising under the laws of the United States are such

as *grow out* of the legislation of Congress whether they constitute the right, or privilege, or claim or defense of the party in whole or in part by whom they are asserted.

Tennessee v. *Davis*, 100 U. S. 257, 264;
Railroad Co. v. *Mississippi*, 102 U. S. 135, 141.

In such cases the federal courts have jurisdiction regardless of the question of citizenship.

Pope v. *Louisville New Albany Railway*, 173 U. S. 573.

We may cite several familiar instances of cases arising under the laws of the United States where no question of statutory interpretation whatever is involved:

(1) Corporations created under the laws of the United States may sue in the federal courts, regardless of any controverted question of statutory construction.

Pacific Railroad Removal Cases, 115 U. S. 1;
Texas and Pacific Railway Co. v. *Cody*, 166 U. S. 606.

(2) Assignees in Bankruptcy, under the Act of 1867, had the same privilege.

Lathrop, Assignee v. *Drake*, 91 U. S. 516.

Prior to the Revised Statutes the State and federal courts had concurrent jurisdiction of such actions.

Caflin v. *Houseman*, 93 U. S. 130.

An action by an assignee in bankruptcy to recover the assets of a bankrupt or set aside fraudulent transfers does not involve any question of controverted federal statutory interpretation—yet such actions arise under or *grow out* of the laws of the United States:

(2) Receivers appointed by the United States Courts may maintain in the federal courts any kind of action necessary to aid the performance of their trusts. Such actions likewise arise under the laws of the United States, and do not necessarily involve any questions of statutory interpretation.

Texas and Pacific Railway v. *Cox*, 145 U. S. 593.

Does the present action *grow out* of the laws of the United States?

The authority of Congress to legislate concerning the disposal of the public lands, to prescribe the terms and conditions under which they may be purchased and the methods by which title in fee may be transmitted is unquestioned. A glance at the public land laws shows that there is a material difference between the system devised for transferring title to public agricultural lands and that devised for those falling in the category of mineral. A brief comparison of the two systems will not be out of place.

The system devised by Congress regulating the disposal of all classes of public lands other than mineral confides to the Land Department, as a special tribunal created for that purpose, the duty of investigating and determining all conflicting claims without the aid or advice of the courts. With its discretionary powers the courts cannot interfere. Injunction will not lie to restrain it from acting, nor will mandamus issue to compel it to act.

Marquez v. *Frisbie*, 101 U. S. 473;
Litchfield v. *Richards*, 9 Wall. 575;
Gaines v. *Thompson*, 7 Wall. 347;
Cox v. *McGarrahan*, 9 Wall. 298.

Nor will the courts exercise any direct appellate jurisdiction for the purpose of reversing or correcting its errors.

Quinby v. *Conlan*, 104 U. S. 420;
Shepley v. *Cowan*, 91 U. S. 330.

"Until the legal title to public land passes from the Govern-
" ment, inquiry as to all equitable rights comes within the
" cognizance of the Land Department. In *United States* v.
" *Schurz*, 102 U. S. 378, 396, which was an application for a
" mandamus to compel the delivery of a patent, it was said,
" 'Congress has also enacted a system of laws by which
" 'rights to these lands may be acquired, and the title of the
" 'Government conveyed to the citizen. This Court has with
" 'a strong hand upheld the doctrine that so long as the legal
" 'title to these lands remained in the United States and the

" ' proceedings for acquiring it were as yet *in fieri*, the courts
" ' would not interfere to control the exercise of the power
" ' thus vested in that tribunal. To that doctrine we still
" ' adhere.' . . . So long as the legal title remains in the
" Government all questions of right should be solved by
" appeal to the Land Department and not to the courts. . . .
" the courts must as a general rule be resorted to only when
" the legal title has passed from the Government."

Brown v. *Hitchcock*, 173 U. S. 473, 476-8.

A suit in the courts instituted by one contesting the right of a homestead claimant to enter and receive a patent for a given tract of agricultural land is not known to our system of jurisprudence. There is no legal sanction for it, no law authorizing it.

A contesting agricultural claimant who is unsuccessful before the Land Department must bide his time until patent issues, and then seek to control the legal title if by mistake of law the Land Department has improperly awarded the land to the wrong person, or has attempted to act beyond the scope of its authority.

Actions of this character may be instituted in the federal courts regardless of the question of citizenship, as they arise under the laws of the United States.

Mitchell v. *Smale*, 140 U. S. 406;
Doolan v. *Carr*, 125 U. S. 618;
Spokane Falls and Northern Ry. v. *Zeigler*, 167 U. S. 65.
Walker v. *Richards*, 55 Fed. 129;
Linkswiler v. *Schneider*, 95 Fed. 203.

The methods devised by Congress for transmitting title of mineral lands to those qualified to purchase them is radically different. The equitable rights involved in the controversy over a mining claim, where patent is applied for and adverse claims are filed in the Land Office, are not determined by the Land Department, but are referred to the courts for final determination. Unless the action is brought, all asserted rights adverse to the patent applicant are waived and forever lost. The federal law *requires* the action to be brought, and within a

specified time, and fixes a penalty for a failure to bring it. From the time the adverse claim is filed until it is either abandoned or waived, the jurisdiction of the Land Department is suspended. If it attempts to act prior to the final determination of the litigation, its acts are void.

Richmond v. *Rose*, 114 U. S. 576, 584.

In the patent proceedings the courts act as an auxiliary tribunal, aiding the Land Department in determining the merits of the controversy and assisting the government in the administration of its public land system.

Perego v. *Dodge*, 163 U. S. 160, 167.

"If the Court decides for one party or the other the Land "Department is bound by the decision. If it decides that "neither party has established a right to the mine or any part "of it, this is equally binding as the case then stands."

Richmond v. *Rose*, 114 U. S. 576, 585.

This is by virtue of the *laws of the United States*. An examination of the adjudicated cases shows clearly that the action has been treated by the courts as one that is statutory—arising under the laws of the United States. It has been denominated by this Court an "action brought under a special stat-"ute of the United States," "a statutory action."

Bennett v. *Harkrader*, 158 U. S. 441, 447.

"The proceedings in this case commenced by the assertion "of the defendant's claim to have a patent issue to them for "the land in controversy. The next step was the filing of an "adverse claim by the plaintiffs in the land office, and the "present suit is but a continuation of those proceedings, "prescribed by the laws of the United States to have a "determination of the question as to which of the contesting "parties is entitled to the patent."

Wolverton v. *Nichols*, 119 U. S. 485, 488.

In Colorado actions of this character are held to be purely statutory.

Keeler v. *Trueman*, 15 Colo. 143, 146,

and the proceedings must be conducted in accordance with the Congressional law which authorizes them.

McGinnis v. *Egbert*, 8 Colo. 41, 55;

Manning v. *Strehlow*, 11 Colo. 451.

In other States and Territories similar views have been expressed.

Mattingly v. *Lewisohn*, 8 Mont. 259, 263;
McKay v. *McDougal* (Mont.) 48 Pac. 988, 992;
Mars M. Co. v. *Oro Fino M. Co.* 7 S. Dak., 605, 65, N. W. 19;
Iba v. *Central Association of Wyoming* (Wyo.), 42 Pac. 20;
Providence G. M. Co. v. *Burke*, (Ariz.), 57 Pac. 641.

This comparison of the two systems regulating the disposal of the two classes of public lands gives us this net result:

(1) In agricultural entries the courts perform no functions until after patent. Controversies then arising over the antecedent action of the Land Department are matters of federal cognizance regardless of the question of citizenship.

(2) In applications to patent mineral lands all contested questions of both fact and law are relegated to the courts whose judgments control and are the bases of final action by the Land Department. Necessarily in performing the functions, which in agricultural entries are performed by the Land Department, the rule and measure of decision controlling the courts are necessarily the laws of the United States. These matters are as essentially of federal cognizance, regardless of the question of citizenship, as they would be after patent in the case of agricultural entries.

Counsel for appellant seems either to confuse the class of actions contemplated by Section 2326 of the Revised Statutes with the ordinary actions to determine adverse claims to real property authorized by the various State laws or to intimate that in the absence of a diversity of citizenship this State statutory remedy is not only all sufficient, but that the State forum is the only court of competent jurisdiction.

We may briefly summarize our contentions as follows:

1. The action arises under the laws of the United States because it is required by those laws to be instituted and prosecuted to final judgment in aid of the Land Department, and as a part of the patent proceedings. The jurisdiction in cases of this character does not depend upon either the citizenship of the parties, or a controverted question of statutory interpretation.

2. The Federal and State Courts are, with reference to the forum in which this class of cases is to be litigated, courts of concurrent jurisdiction. The adverse claimant may seek either tribunal. If he select a State Court, the patent applicant may remove to the Federal Court, or may waive his right of removal and proceed to trial in the State Court. If the latter course is adopted, he will be barred from suing out a writ of error to the highest State Court unless a federal question, *i. e.*, a question of controverted federal statutory construction, appears upon the face of the record, and it is urged *at the trial.*

I.

Whenever the question of the jurisdiction of Federal Courts in cases of this character has been presented or discussed, whether directly or incidentally involved, these courts have uniformly upheld their right to entertain such jurisdiction. The cases (with the exception of two very recent ones) are cited and referred to in the prevailing opinion of the Circuit Court of Appeals. Justice Miller, sitting as Circuit Judge in the Eighth Circuit, first announced the doctrine eighteen years ago in *Frank* v. *Larimer*, 8 Fed. 724. We shall not attempt to add anything to the reasoning of the Circuit Court of Appeals in its reference to and treatment of the cases following the doctrine of *Frank* v. *Larimer*, contenting ourselves with their mere citation:—

Cheesman v. *Shreve*, 37 Fed. 36;

Doe v. *Waterloo Mining Co.*, 43 Fed. 219;

Strasburger v. *Beecher*, 44 Fed. 209, 213;
Burke v. *Bunker Hill & S. M. Co.*, 46 Fed. 644, 646;
Wise v. *Nixon*, 76 Fed. 3, 6.

In the opinion of the Circuit Court of Appeals sanction for the rule announced in these cases is found in the decisions of the Supreme Court of the United States.

Jackson v *Roby*, 109 U. S. 440;
Chambers v. *Harrington*, 111 U. S. 350.

Since the opinion in the case at bar was rendered by the Circuit Court of Appeals, Judge Wellborn, sitting as Circuit Judge in the Southern District of California, has, in our judgment, contributed something of value to the discussion of the question. After announcing the rule that where "federal question" is invoked in support of the jurisdiction of the Circuit Court, it must appear by the plaintiff's statement of his own claim: First, that an actual dispute exists between the parties as to the meaning of some constitutional provision or law of the United States; and, second, materiality of the construction of such provision or law to a determination of the cause, the Judge proceeds as follows:—

"An action brought pursuant to Sections 2325 and 2326 "Rev. Stats. U. S., where patent has been applied for and "adverse claimed filed, is said to be an apparent exception to "the rule above stated as to the essentials of a federal ques- "tion (citing cases, including those referred to by the Circuit "Court of Appeals, as well as the case at bar). These cases "are perhaps sustainable upon either one of the following "theories: First: That the suit referred to in said section is "but one step in a purely statutory procedure which has its "inception, not in the Court in which the suit is brought, but "in the Land Office. Second: Said Section 2326 Rev. St. "provides among other things that 'it shall be the duty of "'the adverse claimant within thirty days after filing his "'claim to commence proceedings in a court of competent "'jurisdiction, to determine the question of the right of pos- "'session, and prosecute the same with reasonable diligence "'to final judgment; and a failure so to do shall be a waiver "'of his adverse claim.' It cannot be supposed that Congress "would subject the adverse claimant to forfeiture of his "interest by reason of failure to institute suit without provid-

"ing a tribunal in which such claimant could sue as a matter "of right. Now, since Congress is powerless to confer juris- "diction on a State court, the presumption is a fair, if not "necessary, one that said statute confers jurisdiction on fed- "eral courts."

California Oil and Gas Co. v. *Miller*, 96 Fed. 13, 18.

The doctrine announced by the Circuit Court of Appeals in the case at bar has also been recently reiterated and reaffirmed.

McFadden v. *Mountain View M. & M. Co.*, 97 Fed. 670.

Nevada Sierra Oil Co. v. *Miller*, 97 Fed. 681.

Two propositions, it seems to us, are well settled.

First: In the administration of the public land system the States have no duty to perform. Whatever steps are prescribed for the acquisition of title to the public lands are prescribed by the paramount proprietor, and under the federal constitution Congress has the sole power to provide for the disposal of such lands.

Second: In the administration of this system Congress has no power to confer upon the State courts jurisdiction, or to compel such courts to perform auxiliary or ancillary functions in the disposal of the public lands. The jurisdiction of the State courts is referable to the constitution and laws of the State. It is true that the State courts, having competent jurisdiction in other respects, may be resorted to for the purpose of enforcing the federal laws, where such courts are not excluded by express provision or by incompatibility arising from the nature of the particular case. In such case the State courts do not exercise any new jurisdiction, but their ordinary jurisdiction derived from their constitution under the State law.

Claflin v. *Houseman*, 93 U. S. 130;

1 Bailey on Jurisdiction, Sec. 93.

Relief must be administered in a State court according to the procedure and the requirements of the State law. Congress has no right to dictate to the State court the form of a judgment which must be entered in a given action simply because the federal government desires to use it in aid of its

administration of the public land system. The danger of denying to adverse claimants of mining claims contesting patent application the right to invoke the jurisdiction of the federal courts lies in the possibility that the State courts may refuse the relief required by the act of Congress. Let us illustrate.

In administering the public mineral land laws the Land Department declines to give controlling effect to judgments of courts in actions which are not prosecuted under Section 2326 of the Revised Statutes.

The department will not be controlled by judicial proceedings instituted outside of the sanction of that section, nor will a judgment rendered in an ordinary action, by which we mean one wholly disconnected with the patent proceeding, be considered as aiding the department.

North Star Lode, 28 Land Dec. 41;
420 *M. Co.* v. *Bullion M. Co.*, 2 Copp's L. O. 5;
Seymour v. *Wood*, 4 Copp's L. O. 2;
Nichols v. *Becker*, 11 L. D. 8, 14;
Cain v. *Addenda Mining Company*, 24 L. D. 18, 20.

Suppose the State Courts decline to recognize the earmarks of a suit brought under this section of the Revised Statutes, or refuse to give a judgment in the form required by the federal law? The danger of it so doing is something more than chimerical. We quote from the decision of the Supreme Court of California, in illustration of this:—

"Under the State laws either party may bring an action to "determine an adverse claim, but the jurisdiction and the "procedure governing the action depends entirely upon our "State Constitution and laws. This action seems well adapted "to the object sought to be accomplished by the Congressional "law, for in it the rights of the parties are wholly determined "by the Acts of Congress and involve the same questions as "to the relative rights which the officers of the Land "Department would otherwise have been required to pass "upon. *But it does not matter to the State Court whether its "judgment can be made available in the Land Office or not.* . .

"The rights of the parties will be entirely determined by the "laws of the United States granting the right to enter upon "the mineral lands and to extract metals therefrom and to

" acquire title thereto, *but the suit must be tried in every respect* " *as though no contest was pending in the Land Office of the* " *United States in regard to the right to purchase the same.* The " Court would be *at liberty* to order a special verdict if that was " desired by the parties because it would be more serviceable " in the contest, for that may be done in any case and such " contingency is provided for in our practice."

Altoona Q. M. Co. v. *Integral Q. M. Co.*, 114 Cal. 100, 102, 103.

And in another case the same Court said:—

" The action was brought 'to determine the question of the " 'right of possession' of certain mining land, and that was the " only question involved. The Court had nothing to do with " the proceedings in the Land Office and no power to determine " as to their regularity or irregularity, sufficiency or " insufficiency."

Quigley v. *Gillett*, 101 Cal. 462.

Suppose an action is commenced in the State Court to determine such an adverse claim, and was in form ejectment, the adverse claimant being out of possession. Under the State laws the defendant in that class of actions might rely on the weakness of plaintiff's title, without the necessity of establishing his right to the land. But the federal law requires a judgment, as to whether *either* of the parties had complied with the Act of Congress, an investigation which we submit the State Court could not be compelled to make. The duty of the State Court under the State laws is fully performed when it determines that plaintiff has failed to make out a case. It is not concerned with anything beyond that.

It would seem, following the suggestion of Judge Wellborn heretofore quoted that Congress did not intend to close the door of the federal court to the adverse claimants, that being the only tribunal whose practice and procedure could be regulated by Congress, the only Court which had the power to investigate the regularity or irregularity of the proceedings in the Land Office, the only Court which could be legally charged with the power to render a decision in accordance with the laws of Congress and to so render it in form that it might be available in the Land Office and this as a matter of duty and not merely as a matter of *grace*.

If there is any doubt about the correctness of this position we submit that it should be resolved in favor of the construction given to the federal law by the federal courts for eighteen years. Under this construction judgments have been entered and patents issued for large acres of public mineral lands throughout the mining regions.

The only authority relied upon to confute this doctrine is the case of *Bushnell* v. *Crooke*, 148 U. S. 682, to which we will presently address ourselves.

2.

We do not contend that the federal courts have exclusive jurisdiction over actions of this character. Congress might make it exclusive, as the subject-matter *i. e.*, disposal of the public lands, is one with which Congress alone can deal.

> "Rights, whether legal or equitable, acquired under the laws "of the United States, may be prosecuted in the United States "Courts, or in the State Courts, competent to decide rights of "the like character and class; subject, however, to this quali- "fication, that where a right arises under a law of the United "States, Congress may, if it see fit, give to the the federal "courts exclusive jurisdiction."
>
> *Claflin* v. *Houseman*, 93 U. S. 130, 136.

That the States have concurrent jurisdiction with the Federal Courts for the enforcement of many rights arising under the laws of the United States is well settled.

Claflin v. *Houseman*, *supra*;

Wilcox v. *Luco*, 118 Cal. 642; 62 Am. St. Rep. 306;

Brinkerhoff v. *Bostwick*, 88 N. Y. 60.

That in actions brought under Section 2326 of the Revised Statutes the State Courts in the mining regions have always been open to suitors is undoubted. Such courts have so far as their State procedure permitted taken cognizance of the action, because it involved the right of possession to real estate. But this by no means proves that the Federal Courts have no jurisdiction unless diversity of citizenship exists.

The case of *Bushnell* v. *Crooke*, 148 U. S. 682, upon which Judge Gilbert of the Circuit Court of Appeals bases his dis-

senting opinion in the case at bar, and upon which counsel in this case relies for a reversal, was an action brought in the State Court based upon an adverse claim under 2326 of the Revised Statutes.

An examination of the record of that case filed in the Supreme Court of the United States, to which we invite the Court's attention (Record Case No. 13,787, October Term, 1892, No. 195), discloses the following: The parties litigant were citizens of different States, the plaintiff, Crooke Mining and Smelting Company, being a corporation organized under the laws of New York, and the defendants, Bushnell and others, being citizens of the State of Wisconsin. The action was commenced in the State Court, and, after the defendants had appeared and answered, plaintiff caused it to be removed to the Federal Court on the sole ground of diversity of citizenship (Record, fols. 37 and 38). In the Federal Court a motion was made by the defendants to remand to the State Court, the ground specified among others being the insufficiency of the bond filed by plaintiff on removal (fol. 42).

The Circuit Court remanded the cause *on the sole ground of the insufficiency of the bond* (fol. 44). There was no suggestion in the application for removal on the motion to remand or in the order remanding, of "federal question" or that the case arose under the laws of the United States. The case was tried in the State Court, appealed to the State Supreme Court and finally determined by that Court before there was any suggestion of "federal question."

Even in the petition for rehearing we failed to observe any such question properly stated. *The question under consideration in the case at bar was not raised, discussed or referred to anywhere in the entire record in the Bushnell-Crooke case nor in the arguments of either counsel. Not a single case cited in the majority opinion of the Circuit Court of Appeals in its decision in the case at bar was cited, referred to or commented on either by counsel in their briefs or by the Supreme Court of the United States in the Bushnell-Crooke case.*

Another significant fact shown by the record in the Bushnell case. Bushnell *resisted* federal jurisdiction in the first instance, caused the case to be remanded to the State Court, tried it without suggesting "federal question," was defeated and after final overthrow in the State Supreme Court came to the Supreme Court of the United States, as counsel for defendant in error said, "knocking at the doors of this Court and under "the pretense that some right or title claimed by them under "the federal law has been denied, assume that this Court has "jurisdiction of the case." And the contention was made that plaintiffs in error were estopped by their former conduct to invoke the jurisdiction of the Supreme Court of the United States.

If an adverse claimant under Section 2326 of the Revised Statutes commences his action in a State Court the defendant may remove to the Federal Court, because the case might have been originally instituted there. If he fails to do so, he waives his right to invoke the jurisdiction of the Federal Courts at any stage of the proceedings, unless during the trial, a federal question, by which I now mean a *controverted question of statutory interpretation*, becomes involved, and is asserted before judgment, and appears upon the face of the record. Unless so involved and asserted no writ of error will lie from the Supreme Court of the United States.

We do not have to go far afield for fitting analogies supporting this proposition.

As heretofore observed, under the National Bankrupt Act of 1867 and prior to the Revised Statutes, the State and Federal Courts had concurrent jurisdiction of suits for the settlement of conflicting claims to property belonging to the estate of a bankrupt. An assignee might sue in a State Court and collect the assets. If he submitted himself to the jurisdiction of the State Court he was bound by the judgment.

Claflin v. *Houseman*, 93 U. S. 130;
Mays v. *Fritton*, 20 Wall. 414;
McHenry v. *La Societe Francaise*, 95 U. S. 58.

Actions arising under the old Bankrupt law if commenced in a State Court might be removed to the Federal Court regardless of citizenship as they arose under the laws of the United States.

Connor v. *Scott*, 4 Dillon 242; Fed. cases, No. 3119;
Houser v. *Clayton*, 3 Woods 273; Fed. cases, No. 6739;
Woolbridge v. *McKenna*, 8 Fed. Rep. 650, 676.

A right of removal may be waived.

Hanover National Bank v. *Smith*, 13 Blatchf. 224; Fed. cases, No. 6035;
Home Ins. Co. v. *Curtis*, 32 Mich. 402.

Certainly, one having waived a right of removal or himself invoked the jurisdiction of the State Court or resisted removal to the Federal Court, where, as in the case at bar, the action upon its face arose under the laws of the United States, ought not to be allowed a writ of error from the Supreme Court of the United States.

A right of removal exists in case of diversity of citizenship. If a non-resident defendant failed to exercise the right, and suffered defeat in the highest State Court, he certainly would not be permitted to sue out a writ of error in the Supreme Court of the United States on the ground of diversity of citizenship. Some other ground of federal cognizance must have been asserted at the trial.

The pivotal point in the Bushnell-Crooke case assuming, for the purpose of argument, that the petition for rehearing addressed to the Supreme Court of Colorado, showed the existence of a "federal question," *i. e.*, controverted question of statutory interpretation, was undoubtedly the fact that the suggestion came *too late*. This is manifest from a reading of the decision in this Court and authorities there cited (148 U. S., p. 689). The record must show that the right was claimed in the trial Court.

Brooks v. *Missouri*, 124 U. S. 394.

The doctrine has been reiterated by this Court at its present term.

Scudder Administrator v. *Coler*, No. 55, Oct. T., 1899; decided Oct. 30, 1899.

We think we may safely assert that this Court never intended to overthrow the doctrine announced by the Circuit Court of Appeals in this case and the precedents upon which it is based, a rule that had been uniformly followed for eighteen years in the Federal Courts of the mining regions, and under which rights to mining properties of incalculable value have been litigated, tried and determined.

If the Court had any such intention it would have manifested it unequivocally. The truth is apparent. Neither the litigants, counsel or the Court ever thought of the question as it is here presented. This we submit effectually disposes of this branch of the case.

II.

EQUITY JURISDICTION.

Is the action arising out of the patent proceeding instituted pursuant to the provisions of Section 2326 of the Revised Statutes, when prosecuted in the Federal Courts, an action at law or in Equity?

It seems to us that this question is set at rest by the decisions of this Court. In an action prosecuted in the territorial courts of Montana, arising out of the patent proceeding wherein the pleadings were substantially the same as in the case at bar, this Court said:—

"As seen by this statement the suit is brought for special "relief, and the judgment entered is such as a court exercis- "ing jurisdiction in equity alone could render."

Hammer v. *Garfield M. Co.*, 130 U. S. 295.

It seems to us that the true character of the action is aptly stated by Circuit Judge Ross:—

" The sole object of the proceeding in court is the deter-
" mination of the contest that arose in the Land Office, the
" point of which is, which of the applicants, if either, is
" entitled to receive the patent from the government. The
" right of possession referred to in the statute, under consid-
" eration, is not the right which flows from and is a part of
" the title or ownership of private land, and which is enforced
" in an action of ejectment by the recovery of the land. It
" has no relation to such a right, but it is the right that flows
" from a compliance with the laws prescribed by Congress for
" the acquisition of the government patent for mineral lands.
" Such a right never was, and never could be, the subject of
" any common law action, and its determination, therefore, on
" the equity side of the court, cannot be as argued for defend-
" ant, a violation of that provision of the constitution which
" declares that the right of trial by jury shall be secured to
" all and remain inviolate forever."

Doe v. *Waterloo Min. Co.*, 43 Fed. 219, 221.

This question was recently before the Supreme Court of Arizona where a like doctrine was announced.

Providence Gold Min. Co. v. *Burke*, 57 Pac. 641, 643.

Appellants complain that if the action had been tried in the State court under the Idaho Statute they would have been entitled to a jury. By the ruling of the Federal Court (holding it to be a case in equity), they were denied that right. In the first place, they never demanded a trial by jury in the Federal Court. In the next place, the case was not instituted or tried under the Idaho Statute. Counsel for appellant lays some stress on the fact that the Statutes of Idaho providing for the determination of conflicting claims to real estate has been determined by the Supreme Court of that State to be an action at law, and that the Federal Courts are bound by the interpretation given by the highest court of the State to a *State* Statute. That may be true, but, as heretofore suggested, this action was not prosecuted under a State Statute, but under a law of Congress. In addition to this:—

" It may well be affirmed that a State, by prescribing an
" action at law to enforce even statutory rights, cannot oust a
" Federal Court, sitting in equity, of its jurisdiction to enforce
" such rights, provided they are of an equitable nature."

Sheffield Furnace Co. v. *Withrow*, 149 U. S 574, 579.

"A construction therefore that would adopt the State "practice in all its extent would at once extinguish in such "States the exercise of equitable jurisdiction. The Acts of "Congress have distinguished between remedies at common "law and in equity, yet this construction would confound "them. The Court therefore thinks that to effectuate the "purposes of the Legislature the remedies in the Courts of "the United States are to be at common law or in equity, "not according to the practice of the State Courts, but "according to the principles of common law and equity as "distinguished and defined in that country from which we "derive our knowledge of these principles."

Robinson v. *Campbell*, 3 Wheat. 212, 222;
Quoted in *Sheffield Furnace Co.* v. *Whithrow*, *supra*.

Suits in which relief is sought according to the priniciples of equity and practice in equity cases are "cases in equity."

Robinson v. *Campbell*, 3 Wheat. 212;

U. S. v. *Howland*, 4 Wheat. 108;

Lorman v. *Clarke*, 2 McLean, 568; Fed. cases, No. 8516;

Gordon v. *Hobart*, 2 Sumn. 401; Fed. cases, No. 5609;

Pratt v. *Northam*, 5 Mason, 95; Fed. cases, No. 11,376;

Cropper v. *Colburn*, 2 Curt. 465; Fed. cases, No. 3416.

"We think the rule is settled in this Court that whenever a "new right is granted by statute, or a new remedy for viola- "tion of an old right, or whenever such rights and remedies are "dependant on State Statutes or Acts of Congress, the juris- "diction of such cases as between the law side and the equity "side of the Federal Courts must be determined by the "essential character of the case, and unless it comes within "some of the recognized heads of equitable jurisdiction it "must be held to belong to the other."

Van Norden v. *Morton*, 99 U. S. 378, 380.

The action at bar was brought by a party alleged to be the owner, subject to the paramount title of the United States and to be in possession to determine an adverse claim to the premises in dispute. Eliminating from consideration the averments of the bill concerning the proceedings in the Land Office, the pleading is an action to quiet title against one asserting a hostile right. Actions to quiet title can only be maintained in the Federal Courts where the plaintiff is in possession, or where both parties are out of possession,

notwithstanding the *State Statute* permits its maintenance regardless of possession.

Clark v. *Smith*, 13 Pet. 185, 202;
Holland v. *Challen*, 110 U. S. 15;
Whitehead v. *Shattuck*, 138 U. S. 146;
Davidson v. *Calkins*, 92 Fed. 230.
Balmear v. *Otis*, 4 Dill. 558;

The decree in the case at bar determines that the appellees, plaintiffs below, were in possession as they alleged. Counsel's assertion that *both* parties were in possession is not only a solecism, but is also not justified by the record.

Bills of peace, *quia timet* or to quiet title, are recognized in the Federal Courts as "cases in equity," notwithstanding the fact that in the State Court they may be at law or in equity.

In *McConihay* v. *Wright*, 121 U. S. 201, 206, which was an action to quiet title to certain real estate, it was objected that the case was not one of equitable jurisdiction, because by a Statute of West Virginia the complainant might have maintained an action of ejectment. The Court said:—

"Admitting this to be so, it, nevertheless, cannot have the "effect to oust the jurisdiction in equity of the Courts of the "United States as previously established. That jurisdiction, "as has often been decided, is vested as a part of the judicial "power of the United States in its Courts by the Constitution, and Acts of Congress in execution thereof. Without "the assent of Congress that jurisdiction cannot be impaired "or diminished by the Statutes of the several States regulating the practice of their own courts. Bills *quia timet* such "as the present belong to the ancient jurisdiction in equity, "and no change in State legislation, giving in like cases "a remedy by action at law can of itself curtail the jurisdiction in equity of the Courts of the United States. The "adequate remedy at law, which is the test of equitable jurisdictions in these courts, is that which existed when the "Judiciary Act of 1789 was adopted, unless subsequently "changed by Act of Congress."

Upon questions of this character, depending upon the general principles of equity jurisprudence, the Court does not hold itself bound by the decisions of the highest court of the

State in which the land in question was, but will be governed by its own view of these principles.

Russell v. *Southard*, 12 How. 138, 147.

It has been at times urged that in passing the Act of March 3, 1881, supplementing the Revised Statutes Congress by using the term *jury* in the phrase "that if in any action brought "pursuant to Section 2326 of the Revised Statutes, title to "the ground in controversy shall not be established by either "party, the *jury* shall so decide," intended to give to the action a purely legal character. This Court has fully disposed of that question as follows:—

"We do not regard the Act of March 3, 1881, as intended "to require or requiring all suits under Section 2326 to be "actions at law and to be tried by a jury."

Perego v. *Dodge*, 163 U. S. 160, 168.

Counsel for appellants also assert (although for what purpose we fail to observe) that the estate in an unpatented mining claim is a legal estate, a legal title, not an equitable title.

It is conceded that in all ordinary actions between individuals the estate conferred by a valid perfected mining location is classified as an estate of freehold, or fee simple, by reason of the acquiescence of the paramount proprietor in State decisions so determining long prior to the enactment of the mining laws, as well as by reason of the Act of Congress which provides, "that no possessory action between indivi- "duals in any of the courts of the United States for the recovery "of any mining title or for damages to such title, shall be "affected by the fact that the paramount title to the land on "which such mines are, is in the United States, but each "case shall be adjudged by the law of possession."

Rev. Stats. Section 910.

All ordinary actions may be predicated upon it as upon a legal title. But in the proceeding instituted in the Land Office, for the purpose of obtaining a patent, the asserted title is purely equitable. The federal mining laws provide for three classes of title.

(1.) Possessory: a location prior to entry and payment.
(2.) Complete equitable: a location after entry and payment and before patent.
(3.) Fee simple: after patent.

Benson M. & S. Co. v. *Alta M. & S. Co.*, 145 U. S. 428, 430.

It seems to us absurd to say that in the patent proceeding a mining claimant has a legal title as against the paramount proprietor. The object of the proceeding is to divest that proprietor of the legal title.

But conceding the title to be a legal one for all purposes the equitable action *quia timet* or to quiet title as to ordinary real estate is necessarily predicated upon a legal title and strictly so. No decree in such an action can be based upon an equitable title.

We think there can be no question but that the action at bar was properly brought on the equity side of the Court and that the rule announced by the Circuit Court and by the Circuit Court of Appeals in this case and by the Circuit Court in *Doe* v. *Waterloo*, 43 Fed. 219 and *Preston* v. *Hunter*, 67 Fed. 996, is in harmony with the decisions of the Supreme Court of the United States.

III.

VALIDITY OF THE KIRBY LOCATION.

Necessarily the validity of the Kirby location must be determined from a consideration of the facts and *all* the facts. This being an equity case, the Appellate Court might take the whole case "by its four corners" (if the record were before it), and review the action of the lower court, as to its conclusions upon these matters of fact. But all that this Court has before it is a "*statement on appeal*," something unknown to the equity practice in the Federal Courts. The certificate to this statement on appeal (Transcript, 175) discloses the fact that it was presented by appellants' counsel, with a request for its settlement. That the appellees declined to propose any amendments to it; but insisted that the entire testimony be substituted for the "statement" in accordance with the

equity practice. Thereupon the trial court settled the statement; but ordered that the reporter's statement of the testimony and proceedings had at the trial "shall go with the "record as a part hereof, but not to be printed, to the said "court of appeals, where it may be used by either party or "the Court." While this might have answered so far as the Circuit Court of Appeals was concerned, no such order is made so far as the present appeal is concerned, and there is as a matter of law no record now before this Court from which it can determine whether the conclusions upon questions of fact were properly reached or not. It must, we respectfully submit, necessarily follow that, if the jurisdictional questions heretofore discussed are resolved in appellees' favor, they are entitled to an affirmance of the judgment without considering the remaining questions presented by counsel in their opening brief. With this suggestion and protest we will briefly present our views on these remaining questions.

A.

Was the ground covered by the "Kirby" subject to location?

It is claimed that at the time the "Kirby" was located there was a prior subsisting location called the "Edith" covering part of the same ground. Therefore no rights were acquired by locating the "Kirby."

The facts are simple. The Edith was located by Day, Sullivan, Johns, and Charlebois on June 15, 1886. Subsequently and on the 11th day of July of the same year, in order to include more ground, the *same parties* located the ground covered by the Edith and the additional ground and called it the Kirby. The Shoshone, claimed by appellants' grantor, was not located *until eight years afterwards*. How the locators of the Shoshone were injured by the relocation of the Edith by the grantors of the appellees under the name of the Kirby, is beyond our conception. This question is fully and completely disposed of in the opinion of both the trial and appellate courts, and anything we might add would be superfluous.

B.

Was there a sufficient discovery within the limits of the Kirby upon which to predicate a location?

The trial Court found necessarily that there was a sufficient discovery, and in this the Appellate Court concurred. We are content with the exposition of the law as laid down by the Circuit Court of Appeals on this branch of the case.

Transcript, p. 254.

Many of the assignments of error appearing in the record on the appeal to the Circuit Court of Appeals, as well as on this appeal, are directed to the *opinion* of the trial Court. We submit that none of these specifications deserve consideration.

That assignments of error directed to the opinion of the trial Court will not be considered on review is certainly well settled so far as the Circuit Court of Appeals is concerned.

Mutual Reserve Fund Life Ass'n. v. *DuBois*, 85 Fed. 586;
Russel v. *Kern*, 69 Fed. 94;
North American L. & T. Co. v. *Colonial and U. S. M.Co.*, 83 Fed. 796;
Evans & Suess Ornamental Glass Co., 83 Fed. 706.

It is submitted that this Court will not consider on this appeal matters which the Circuit Court of Appeals could not consider on the appeal from the trial Court.

C.

If we assume that a discovery was not made until after the other acts of location were performed but was made long prior to the inception of any subsequent location, would such discovery be valid as against the subsequent locator?

We submit that it would most assuredly. How is the subquent locator injured? What difference is it to him, when the discovery was made, if it was made before he made a location?

The order in which the several acts required by law are to be performed is non-essential in the absence of *intervening* rights.

Perego v. *Erwin*, 85 Fed. 904;
Erwin v. *Perego*, 93 Fed. 608;

Thompson v. *Spray*, 72 Cal. 528;
Gregory v. *Pershbaker*, 73 Cal. 109, 116, 117.

All that is required is that a discovery should be made prior to the *inception* of intervening rights.

Erwin v. *Perego*, 93 Fed. 608;
Perego v. *Erwin*, 85 Fed. 904;
Fisher v. *Seymour*, 49 Pac. 30, 33;
Patchen v. *Keeley*, 19 Nev. 404, 415;
North Noonday v. *Orient*, 6 Sawy. 299, 309;
Jupiter M. Co. v. *Bodie Cons. M. Co.*, 7 Sawy. 96, 109;
Wright v. *Taber*, 2 Land Dec. 738, 743;
In re Mitchell, 2 Land Dec. 752.

As was said by the Circuit Court of Appeals:—

"There is no good reason why the owners of the Kirby "should be deprived of the discoveries made by them in "prosecuting the work thereon after the location was made "and prior to the time of the location of the Shoshone claim." Trans., fol. 524, p. 255.

Counsel for appellant in discussing this branch of the case quote from the syllabus to *Van Zandt* v. *Argentine Min. Co.*, 2 McCrary, 159, and state that this case was affirmed by the Supreme Court of the United States (122 U. S. 478). With regard to this case we have the following observations to make:

(1). The case passed upon by the Supreme Court of the United States was *not* the case cited by counsel. The one which this Court *did* pass upon is reported in 5 McCrary, 639, re-reported in 89 Fed. 583. The point here under discussion is not mentioned in either court.

(2). The quoted syllabus is much broader than the decision. The case is also reported in 8 Fed. 725, with an altogether different syllabus.

(3). In the case as reported in 2 McCrary, there was an *intervening* claimant asserting rights acquired before the senior locator made his discovery.

The other cases cited by counsel do not militate against the rule for which we are contending.

IV.

The right of Rutter and Bradley to maintain the action. Were they the real parties in interest? Was the evidence by which appellant sought to show that they were not, admissible?

Rutter and Bradley, appellees, were the grantees of the Kirby by mesne conveyances of record from the original locators (the Shoshone Mining Company, appellant, claimed nothing from this source of title). A party holding the paper title is the "real party in interest." This rule is as ancient as the common law, and citation of authorities is unnecessary. An attempt was made to show that F. W. Bradley, as agent of the Bunker Hill & Sullivan Mining and Concentrating Company, had made certain affidavits of performance of annual labor through several years, wherein it was recited that that company was the owner of the Kirby and had performed the assessment work during these years.

The affidavits were inadmissible for any purpose. They could not divest a title regularly transmitted by written conveyances; they were *res inter alios acta*, and altogether devoid of legal value in this case. The same may be said of the attempt to prove by parol—on cross-examination of Bradley—that he did not own the Kirby ground, after written conveyances had been introduced, showing transmission of title to him and his co-tenant, Rutter. The Circuit Court of Appeals did not consider the suggestion of appellants in the matter as deserving of mention.

V.

Perpetuation of the estate in the Kirby by performance of the annual labor.

The proof showed that annual work was done for and under the sanction of the owners. All that was attempted to be shown by the evidence sought to be introduced on this subject, to the evidence of which counsel for appellant noted an exception, was that the work was performed by the Bunker

Hill & Sullivan Co. and not by Bradley and Rutter. It was not claimed that work was done by that company in hostility to them. It is probable, considering the affidavit of Bradley as agent of the company, that some privity existed between Rutter and Bradley and that company. It will be presumed that even if work was done by the Bunker Hill Company it was done in subordination to the title of Rutter and Bradley. No attempt was made to show that the work was done by a mere trespasser.

It is well settled that work done for the benefit of the claim by one holding the equitable title will operate to preserve the claim from forfeiture and inure to the benefit of the claim.

Book v. *Justice M. Co.*, 58 Fed. 106, 118;

Jupiter M. Co. v. *Bodie Cons. M. Co.*, 7 Sawy. 96, 115;

Nesbitt v. *De Lamar's Nev. M. Co.* (Nev.), 52 Pac. 609, 610.

The Circuit Court of Appeals found no error in the rulings of the trial court with regard to the annual assessment work. And we fail to see anything in the argument of counsel for appellant requiring from us further mention.

VI.

Appellant's title to the Shoshone mining claim.

The trial court as well as the Circuit Court of Appeals having found that the Kirby was in all respects a valid location, based upon a sufficient discovery made long prior to the attempted location of the Shoshone, under which appellant asserts title, any discussion as to the merits or demerits of the Shoshone location, is superfluous. A discussion which must necessarily be speculative—or tentative at best—seems to us should be avoided. There is only one point in this connection which we are inclined to mention.

It was admitted that the discovery of the Shoshone was made underneath the surface at great depth and upon a vein which had its apex within other locations. The trial court

very naturally announced that it did not propose to decide just where the extralateral boundary planes were of the claims covering the apex, as they were not involved in this action. But it was quite evident and it was conceded that the Shoshone did not have the apex of the vein upon which the discovery was made. As every foot of the apex was covered by other claims — some overlapping and conflicting with each other — it is quite rational to assume that the extralateral right of some of them, if not several of them, included the point of the Shoshone discovery. While we do not think the questions are properly involved in this case, we respectfully submit that the following propositions of mining law are well settled:—

FIRST. A location cannot be made on the middle part of a vein or otherwise than on the top or apex.

Larkin v. *Upton*, 144 U. S. 19, 21;
Colorado Central C. M. Co. v. *Turck*, 50 Fed. 888, 895;
S. C. on rehearing, 54 Fed. 262, 267;
Iron S. M. Co. v. *Murphy*, 2 McCrary, 121;
Stevens v. *Williams*, 1 Morr. Min. Rep. 557;
Leadville M. Co. v. *Fitzgerald*, 4 Morr. Min. Rep. 380.

SECOND. Where the apex of a vein has once been embraced within a regular valid location, the estate in the vein throughout its entire depth between the extended end line planes is of the same dignity as that of the surface.

The grant of the right of lateral pursuit is in legal effect a severance of the estate in the vein throughout its entire depth from the ownership of the soil into which it penetrates after passing beyond the vertical planes drawn through the surface side boundaries of the location.

Waterloo M. Co. v. *Doe*, 82 Fed. 45, 50.

The vein in its descent passing out of and beyond vertical planes drawn through the surface boundaries embracing the apex is as much a part of the location as if entirely within its surface lines.

Tyler Min. Co. v. *Last Chance*, 90 Fed. 15, 21.

The Shoshone Company admits that it has no part of the apex, and the inference is irresistible that its so-called deep discovery was upon a segment of the vein which was the property of some one else.

It could no more predicate a location made on a discovery upon the dip of the vein within the extralateral right of a prior locator than it could base such a location upon a discovery within the surface limits of such prior location.

Counsel for appellant devote some considerable space to the discussion of a so-called patent survey of the Kirby — which survey reformed the lines of the location—so that the alleged Shoshone discovery was without the Kirby ground as surveyed.

There are several criticisms to be passed upon this suggestion.

FIRST. The so-called official survey was not made by the owners of the Kirby.

SECOND. It was never used as the basis of a patent application. No amended location was ever made subsequent to the date of the Kirby location. The only muniment of paper title was the Kirby location notice. Merely making a survey, which is never used as a basis of asserted title which is not recognized or adopted by the owners, cannot operate to divest rights which are acquired by the perfection of a valid location. Deputy Mineral Surveyors cannot make locations, nor by their surveys destroy or limit the ownership of claims which they are called upon to survey. Abandonment is a question of intention. No intent to abandon will be presumed. It must be clearly established. We submit that there is nothing in the record disclosing any such intention. All the acts of the owners negative it.

AS TO CASE NO. 102.

As indicated at the opening of this brief, the second of the consolidated cases numbered 102 in the trial Court arose out of an application by Rutter and Bradley, appellees, for a patent to the Kirby. The Shoshone Company appellant claiming to own the Ibex location adversed this application in the Land Office, and in due time brought suit in the State Court under Section 2326 of the Revised Statutes. The defendants, Rutter and Bradley, removed the case into the United States Circuit Court, District of Idaho, on the ground that the action arose under the laws of the United States. No motion to remand having been made, the case was tried, and subsequently consolidated for purposes of appeal with Case No. 81.

The principal questions heretofore presented when considering Case No. 81 are also urged with reference to the second case. It is unnecessary to add anything to what we have already said, further than to suggest that if the Circuit Court and the Circuit Court of Appeals were correct in their views that this class of actions arise under the laws of the United States, and therefore that the Federal Courts have jurisdiction regardless of the question of citizenship, it follows as a corollary that if commenced in the State Court they may be removed to the Federal Court.

There are no errors assigned on this appeal, which are directly referable to this Kirby-Ibex case now under consideration. The trial Court and Circuit Court of Appeals considered the questions in both cases to be practically the same, and having reached conclusions favorable to appellees in the first case, a like result followed in the second.

Counsel for appellants devotes some considerable space to the discussion of the extralateral rights of the "Stemwinder," a discussion which, it seems to us, considering the views of the trial Judge as expressed in his opinion, is somewhat profitless.

We quote from Judge Beatty's opinion :—

" While I am inclined to think that the Stemwinder and " and the other claims named have such extralateral rights " as will include this vein under the 'Shoshone,' I do not " think that question can be determined in this case without " further testimony, but it may be said that if there is any " portion of the ledge within the 'Shoshone' which is not " covered by their extralateral rights, it will belong to the " 'Shoshone' if this latter claim is not void as against the " Kirby."

Transcript of Record, fol. 69, p. 32.

Having found that the " Shoshone " was void as against the Kirby, the question mooted was eliminated out of the case. The extent of the extralateral right of the Stemwinder is a question too important and complicated to be discussed tentatively upon the meagre record now before this Court. It is now being litigated in a suit pending before the same Court which tried the case at bar. The solution of that question should, we submit, be left for determination in the case where it is directly and necessarily involved.

Counsel criticize the local land office for receiving the patent applications of Rutter and Bradley for the Kirby, while the adverse suit with the Shoshone remained undetermined. We may admit that this was a species of unadulterated folly, but no more so than this suit predicated upon the adverse claim filed by appellant in opposition to such application. If the Land Department was without jurisdiction to receive the application, why was the adverse claim filed or this suit commenced? Appellant commenced this action, not appellees. That such action was commenced, maintained, and prosecuted to final judgment by appellant is not assigned as error here, and no attack is made on the judgment on that ground. No plea of " former action pending " was interposed and the case has been disposed of on its merits.

We think we have fully answered all questions presented by counsel for appellant which have any legal bearing upon the case at bar. We think we have also answered and satisfac-

torily disposed of some other questions which, in our judgment, have been unnecessarily injected into the case.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

CURTIS H. LINDLEY,
Solicitor for Appellees.